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ABSTRACT

Two court decisions regarding the right of secrecy of the tenure vote are analyzed: S. Simpson Gray v. Board of Higher Education, City of New York; and Dinnan, Blaubergs v. Board of Regents of the University System of Georgia. In Gray, the Court found that faculty members serving on tenure committees could not be required to divulge how they voted and that a qualified privilege of academic freedom existed. The primary arguments raised by Gray centered upon the issue of unconstitutional racial discrimination. The Court concluded that the issues of disclosure must be balanced and adjudicated on an individual basis and decided that the confidentiality of the faculty peer review system needed to be protected. It was suggested that discovery of individual votes could have a substantial impact on expectations of confidentiality and, consequently, on the decision-making process that relates to granting or withholding tenure. In the Dinnan case, the Court reviewed the philosophic principles surrounding academic freedom as well as the legal requirements of disclosure. The Court held that open disclosure would help to promote responsible decision-making in tenure questions as it clearly sends the message to would-be wrongdoers that they may not hide behind academic freedom to avoid responsibility for their actions. Both professors Gray and Dinnan have filed appeals seeking to reverse the contradictory decisions of the federal courts. (SW)

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NEWSLETTER

National Center for the Study of Collective Bargaining in Higher Education and the Professions

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RIGHTS IN CONFLICT: THE SECRECY OF THE TENURE VOTE

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NEWSLETTER
NATIONAL CENTER FOR THE STUDY OF COLLECTIVE BARGAINING IN HIGHER EDUCATION AND THE PROFESSIONS

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RIGHTS IN CONFLICT: THE SECRECY OF THE TENURE VOTE

Introduction:

In the last issue of the NCSCBHEP *Newsletter*, Vol. 9, No. 4, we presented a paper by Aaron Levenstein on the topic of "Confidentiality and Due Process" consisting of excerpts from a debate held at our Ninth Annual Conference between Professor James Dinnan of the University of Georgia and Professor Levenstein of Baruch College. At that time, Professor Dinnan's appeal from a contempt of court citation was pending before the U.S. Court of Appeals for the Eleventh Circuit. Since that time, the court has handed down its ruling (See *In Re: Dinnan; Blaubergs v. Board of Regents of the University System of Georgia*, C.A. No. 79-42-Ath (M.D. Ga. 5/8/80)), denying Dinnan's contention "... that he has the privilege not to testify ... because he is sheltered by an 'academic freedom privilege.' "

Diametrically opposed to *In Re Dinnan* is the decision of the U.S. District Court for the Southern District of New York in *S. Simpson Gray v. Board of Higher Education, City of New York* 79 Civ. 0062. Here the Court found that faculty members serving on tenure committees could not be required to divulge how they voted and, that a qualified privilege of academic freedom existed. Set forth below is an analysis of both decisions.

Gray v. Board of Higher Education, City of New York

Background: In *Gray*, the court was faced with the issue of whether or not a faculty member denied reappointment with tenure at LaGuardia Community College of the City University of New York was entitled to discovery of the votes of two Personnel and Budget (P&B) Committee members. The two named individuals, M. Moed, Vice President and Dean of Faculty and member of College P&B Committee and R.C. Miller, Chairman, Accounting/Managerial Studies Department, refused to reveal how they voted upon the application for tenure by S. Simpson Gray. Plaintiff Gray was successful before Magistrate Washington who ordered the defendants to reveal their votes pursuant to federal discovery processes.

> The Court is thus faced with the question whether it should order defendants Moed and Miller to answer plaintiff's questions with regard to how they each voted with regard to plaintiff's applications for promotion and/or tenure, or whether it should protect the confidentiality of those votes, either by recognizing a qualified privilege asserted by the defendants with regard to such votes or as a matter of the Court's discretion to limit and control discovery ... this Court reverses the Magistrate and declines to order defendants Moed and Miller to respond to plaintiff's questions.

The Court next addressed the issue of tenure and cited Sec. 6206-b (3) of the New York State Education Law which sets forth procedures regulating the tenure-granting process. Gray, an untenured faculty member, had completed five years of service and either had to be awarded tenure as the result of his sixth year reappointment or denied renewal and thereby, in effect, leave his faculty position.

> It is settled that a non-tenured teacher has no vested right to continuity of employment and has no vested expectation of tenure ... Although a non-tenured teacher may be denied reappointment with tenure for any reason or in the absence of stated reasons, an exception is made where it has been established that the dismissal was for constitutionally impermissible reasons. *Cohoes City School District*. The plaintiff in this case contends that his termination at LaGuardia after his fifth year of teaching was motivated by such impermissible reasons.

The parties did not contest the issue that the personnel practices at CUNY provide". . . that no appointment carries with it the presumption of reappointment or eventual tenure." (See Board of Higher Education, P&B Procedures, December 18, 1967, Point 2). Thus, the primary arguments raised by Gray centered upon the issue of unconstitutional racial discrimination.

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The Issue of Disclosure

The court analyzed the plaintiff's right to discovery relying on Rule 26(b) of the Fed.R.Div.P. Rule 401 and Rule 501 of the Federal Rules of Evidence. Furthermore, they cited WIGMORE EVIDENCE S2285 at 527 and concluded that the issue of disclosure must be balanced and adjudicated on an individual basis.

> In making its appraisal of the benefit likely to be gained by disclosure of communications as to which a claim of privilege is asserted the court must consider whether the desired information is available from other sources; whether the desired information goes to the heart of the matter at issue; the degree of harm that would be caused by disclosure; and the type of controversy before the court.
>
> In recent decisions a number of courts have applied these principles in obeying the admonition of *Trammel v. U.S.* to allow the development of rules of privilege on a case-by-case basis. These courts have either found that in the circumstances of those cases an evidentiary privilege should exist to protect information not otherwise protected under the traditional law of privilege or that the court, pursuant to its discretion to limit and control discovery under Fed.R.Civ.P. Rule 26(c), would not order the production of the requested information.

Academic Freedom

Justice Pierce, writing for the court, presented a detailed analysis of the peer review system and its relationship to the awarding of tenure. He considered tenure to be "an essential linchpin in the commitment to safeguard the academic freedom of individual teachers," and stated that . . . Academic freedom is a value which the Supreme court has found to be of constitutional significance. In *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), the Court stated that "[o] Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us. . . That freedom is therefore a special concern of the First Amendment. In addition, in his concurring opinion in *Sweezy v. New Hampshire*, 354 U.S. 234, 236 (1957), Justice Frankfurter suggested that there should be recognized four essential freedoms for for an institution of higher education: the freedom 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. . .'

The Court cited the AAUP's 1940 *Statement of Principles*, with regards to such issues as (1) the necessity of a tenure probationary period, (2) advanced notice during probationary periods and (3) termination of tenure due to financial exigency or adequate cause.

> The peer review system of decision making with regard to the granting or withholding of tenure is intended to ensure that academic considerations will be of primary concern in the decision whether or not to grant tenure, and has been said to embody "the essence of academic freedom." *Kunda v. Muhlenberg College*, 621 F.2d 532, 547 (3d Cir. 1980). The peer review system has evolved as the most reliable method for assuring promotion of the canditates best qualified to serve the needs of the institution. *Kunda, supra*, at 548.

The CUNY Office for Legal Affairs supported the position taken by defendants Moed and Miller citing University policy which provides that the substance and discussions of P&B Committees must be kept confidential. Furthermore, it is University policy that the deliberations of all P&B Committee votes concerning reappointment, promotion and tenure are to be conducted by secret ballot.

The court in accepting this position held:

> While it is certainly true that generally those voting on tenure decisions are not concerned about reprisals from those about whom they must make judgments, the maintenance of secrecy in the voting process is nevertheless of great value. It is not difficult to perceive that the failure to maintain the confidentiality of votes on tenure decisions would tend to promote divisiveness among faculty members, and could well lead to Department Chairmen and those with greater influence exerting a disproportionate impact on such decisions. In fact, if the process for awarding tenure did not require that voting occur by secret ballot, plaintiff's argument that Drs. Moed and Miller might have unduly influenced the other members of the committee through their votes would be more convincing.

The Balancing Test

Often when two fundamental constitutional rights appear to be in conflict, courts rely on a balancing formula in their attempt to weigh one right against the other. Such was the approach in *Gray* when the Court examined the potential damages that might occur to both Gray and the faculty peer review system. It was clear that Gray had all the reports and evaluations pertaining to his five-year probationary period at LaGuardia Community College. Furthermore, with respect to his claim of unconstitutional racial discrimination, he had access to the necessary statistical, demographic, and historical data of hiring and tenure patterns within CUNY. The Court questioned his need for disclosure of the votes in question.

> It is unclear in what way knowledge will clarify the motivation–either proper or improper–for the committee vote. . .While the protection of the constitutional rights of individual litigants is of serious concern to society, the matter before the Court is neither a criminal investigation nor a grand jury proceeding in which the courts will most vigorously enforce society's need for information despite assertion of a qualified right to confidentiality which does not fall readily into one of the traditionally recognized privileges against disclosure. . . A decision by this Court to the effect that defendants' individual votes with regard to plaintiff's application for reappointment, promotion, and tenure are subject to discovery, could therefore have a substantial impact on expectations of confidentiality and, consequently, on the decision making process which relates to granting or withholding tenure.
>
> In light of the foregoing, the Court concludes that in weighing the potential effects of ordering disclosure, against the potential benefits of disclosure, the scales tip decidedly toward the protection of the confidentiality of the faculty peer review system which it views as embodying a broader societal value.

Judge Pierce acknowledged his awareness of Professor Dinnan's claim in *Blaubergs*. "The Court has considered that opinion in assessing the balancing process which this court used as necessary to its decision on the discovery issue which it faces in the matter at bar." Although the *Dinnan* matter had been adjudicated in a three-judge panal of U.S. Circuit Court of Appeals, Judge Pierce was not estopped nor bound by that decision. It is interesting to note that although not controlling, the *Gray* decision is reportedly being cited by Professor Dinnan as the lead case in his pending appeal.

We now turn our attention to a review of the Dinnan Appeal in *Blaubergs*, citing the salient portions of that decision.

In re Dinnan; Blaubergs v. Board of Regents of the University System of Georgia

Background: Professor James A. Dinnan, a member of a Promotion Review Committee, which denied Maija Blaubergs's promotion and reappointment refused to disclose his tenure vote. Blaubergs, seeking to compel discovery, was successful in Federal District Court arguing that Dinnan be ordered to reveal his vote. She prevailed and in June of 1980 Dinnan was adjudged to be in contempt of court for refusal to disclose his vote and was subsequently fined $100.00 a day for 30 days and sentenced to 90 days in prison. A three-judge panel of the Eleventh Circuit Court of Appeals then considered his appeal in which he claimed academic freedom shielded him from being compelled to testify. The court stated:

> We hold that no privilege exists that would enable Professor Dinnan to withhold information regarding his vote on the promotion of the appellee. This result is required on the basis of fundamental principles of law and sound public policy.
>
> The appellant basically contends that he has the privilege not to testify in the proceedings below because he is sheltered by an 'academic freedom privilege.'

The Privilege of Academic Freedom

As in *Gray* the Court reviewed the philosophic principles surrounding academic freedom as well as the legal requirements of disclosure. They held that certain privileges not to testify are basic and in some instances constitutionally protected. Among these are client-attorney, priest-parishioner and physician-patient relationships.

> Privileges are based upon the idea that certain societal values are more important than the search for truth. There is no question that the doctrine of privilege of immunity from testifying has been narrowly proscribed. The appellant urges us to establish an evidentiary privilege in the instant case in order that 'academic freedom' might be protected. The appellant construes the term 'academic freedom' to include more than it does.
>
> Academic freedom is of transcendent value to all of us and not merely to the teachers concerned. *Keyishian v. Board of Regents*, 385 U.S. 589. Time after time the Supreme Court has upheld academic freedom in the face of government pressure. See, *Cramp v. Board of Public Instruction*, 368 U.S. 278, *Sweezy v. New Hampshire*, 354 U.S. 183. However, in all those cases there was an attempt to suppress ideas by the government. Ideas may be suppressed just as effectively by denying tenure as by prohibiting the teaching of certain courses.

Further cases are also cited, all of which enunciate the protection and special relationship of academic freedom to the First Amendment of the Federal Constitution.

> The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the 'four essential freedoms' that comprise academic freedom: It is the business of a university to provide that atmosphere which is most conductive to speculation, experiment, and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' 438 U.S. at 312. Here, however, we have an allegation that the University of Georgia decided a tenure application on other than academic grounds.

The court then proceeded to examine other cases, (See *Kunda v. Muhlenberg College*, 621F.2d 532 (3d Cir. 1980), and *Johnson v.* University of Pittsburgh, 435F Su. pp. 13-28, (W.D. Pa. 1977).

> Though we recognize the importance of academic freedom, we must also recognize its limits. The public policy of the United States prohibits discrimination; Professor Dinnan and the University of Georgia are not above that policy. To rule otherwise would mean that the concept of academic freedom would give any institution of higher learning a carte blanche to practice discrimination of all types . . . In the instant case, society has no strong interest in encouraging timid faculty members to serve on tenure committees. Additionally, this court is unconvinced that an applicant who is denied tenure can retaliate against tenured faculty members. Therefore, the reasoning that protects political and labor election ballots from discovery is inapplicable here. Thus, we find absolutely no merit in the claim of a secret ballot privilege.

The arguments advanced by Professor Dinnan are discussed and are thoroughly rejected as unconvincing and unpersuasive by the court. His claim that future decision makers would be inhibited if their tenure votes were made public appears to have fallen on deaf ears as his request for what appeared to be a creation of a new confidentiality privilege was repudiated. The court held that open disclosure: . . . "should work to reinforce responsible decision making in tenure questions as it sends out a clear signal to would-be wrongdoers that they may not hide behind 'academic freedom' to avoid responsibility for their actions. . .".

> Dinnan's own position came under severe attack by the Court. No one compelled Professor Dinnan to take part in the tenure decision process. Persons occupying positions of responsibility, like Dinnan, often must make difficult decisions. The consequence of such responsibility is that occasionally the decision maker will be called upon to explain his actions. In such a case, he must have the courage to stand up and publicly account for his decision.
>
> If that means that a few weak-willed individuals will be deterred from serving in positions of public trust, so be it; society is better off without their services. If the

the decision maker has acted for legitimate reasons, he has nothing to fear.

> We find nothing heroic or noble about the appellant's position; we see only an attempt to avoid responsibility for his actions. If the appellant was unwilling to accept responsibility for his actions, he should never have taken part in the tenure-decision-making process. However, once he accepted such a role of public trust, he subjected himself to explaining to the public and any affected individual his decisions and the reasons behind them.

In conclusion, the Court found that neither academic freedom, nor any valid secret ballot issue was raised in this case and:

> the truth-seeking function of our system of justice must prevail over the novel privilege claimed by the appellant. Thus, since the matters sought in discovery were relevant to the claim the district court's order compelling discovery and the contempt order against Professor Dinnan were proper.

Look to the Future

It is ironic that the decision reached in *Dinnan* would have been favored by *Gray* and vice versa. Both Professors Dinnan and Gray have filed appeals seeking to reverse the contradictory decisions of the federal courts. Dinnan is seeking to have *Gray* juxtaposed in his own matter while Gray seeks the disclosure and discovery ordered in *Blaubergs*. Each appellant appears to be basing his case, in part, on these conflicting opinions. Fundamenatal to both cases is the need for further interpretation of Title VII of the Civil Rights Act of 1964 which was the legal issue in the original cases brought by Blaubergs and Gray. While it is too early to predict the outcome of these cases, it is precisely this type of issue, one in which the federal courts are in conflict, that is ultimately decided by the United States Supreme Court.